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No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD BOOTH, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OCTOBER TERM, 1978

No. _____

HAROLD BOOTH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAROLD BOOTH, by and through his attorneys RALPH H. RICHARDSON and S. ALLEN EARLY, JR., petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit, affirming his conviction on one count of conspiracy to manufacture

"C.A. App." refers to the Petitioner's appendix in the Court of Appeals, a copy of which is being lodged with the Clerk of this Court. "App." refers to pages appended hereto.

cocaine and one count of conspiracy to manufacture phencyclidine in violation of Title 21, United States Code, Sections 841(a)(1) and 846 (C.A. App. 380).

OPINION BELOW

(Unreported, as set forth in Appendix A, *infra*).

JURISDICTION

The Order of the Court of Appeals (App. A, *infra*) was entered on June 20, 1979. On July 23, 1979, Mr. Justice White extended the time within which to file a Petition for a Writ of Certiorari to and including August 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

This Petition addresses an issue which Petitioner submits is unresolved. That issue is whether seizure of keys during a warrantless arrest of a property owner as a means of entry into the property and the ensuing search thereof during which the arresting officers observe what later is offered as evidence requires suppression of that evidence, even though actual seizure was achieved following a post-entry warrant based, in part, on the search and observations during the warrantless entry.

The trial court held the seizure valid because the warrant was supported by information beyond that obtained during the warrantless search.

STATEMENT

Surveillance of J. L. Cody who had been dealing with an undercover officer in obtaining chemicals for the manufacture of cocaine and phencyclidine (PCP), led Drug Enforcement Administration agents to 16801 James Couzens (C.A. App. 114). There, Cody met Berkley White (C.A. App. 115). Both men sat in White's automobile until Petitioner Booth arrived (C.A. App. 115).

The building at 16801 James Couzens was owned by Harold Booth (C.A. App. 287).

Booth arrived and unlocked the door of the premises (C.A. App. 115, 181) and all three men entered the building (C.A. App. 116, 181). After fifteen or twenty minutes, at approximately 10:40 a.m., (C.A. App. 116), the individuals exited the building (C.A. App. 116, 181) and were arrested (C.A. App. 116). The agents had no arrest or search warrants.

A search of the three individuals was made on the sidewalk (C.A. App. 182). An agent seized the key to the premises from Petitioner Booth (C.A. App. 182, 188) and opened the door. The agents took Booth, Cody, and White back into the building (C.A. App. 117, 182) and a further search of each occurred (C.A. App. 182). After this detailed search, including a field test of a chemical taken from Mr. Cody's possession (C.A. App. 183) the agents dispersed through the building and searched the premises (C.A. App. 189).

DEA agents then took Booth, Cody, and White downtown for processing (C.A. App. 117). Other agents remained in the building for an additional period of time (C.A. App. 117). They were joined by Special Agent Graetz who had observed the arrests (C.A. App. 117). At approximately 11:00 a.m., Agent Graetz left to obtain a search warrant from the United States Magistrate (C.A. App. 118).

Paragraphs 7 and 8 of the search warrant affidavit contained reference to objects observed during the initial warrantless entry to the premises (App. B). Seizure of materials occurred after a search warrant was issued.

Defense Counsel objected to the initial entry and moved to suppress evidence taken from the premises. The trial judge, the Honorable Ralph Guy, Jr., District Court Judge for the Eastern District of Michigan, Southern Division, ruled that Petitioner had waived his objections due to the untimeliness of the motion (C.A. App. 8). The trial court did allow counsel to make a record for appeal (C.A. App. 8-18). The trial judge then stated that even if the initial entry was illegal the subsequent warrant was not tainted because probable cause existed in the affidavit without regard to the illegal search (C.A. App. 18).

On September 27, 1978, Harold Booth was found guilty by a jury of conspiracy to manufacture cocaine (Count I) and conspiracy to manufacture phencyclidine (Count II), contrary to 21 U.S.C. §841(a)(1) and 846. On November 21, 1978, he was sentenced to concurrent terms of three (3) years in prison, a three (3) year special parole term, and a fine of $1,000.

Timely Notice of Appeal was filed with the Sixth Circuit on November 30, 1978. Extensions of time in which to file briefs were granted.

The case was argued on June 13, 1979. On June 20, 1979, the Sixth Circuit entered its order affirming Petitioner's conviction (App. A, *infra*).

On July 23, 1979, this Court granted an order extending time to file this Petition (App. C, *infra*).

REASONS FOR GRANTING THE WRIT

The decision below which upholds the actions of DEA agents committing a warrantless entry onto the premises and

conducting a search which served, in part, as the basis for the subsequently issued search warrant conflicts with decisions of this Court and opinions in various circuits.

The actions by officers in the case at hand were illegal. The integrity of the Fourth Amendment will suffer greatly if such actions are condoned by the judiciary.

A warrantless search, absent one of the narrowly drawn exceptions to the warrant requirement is presumptively illegal. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The facts of this case do not fit within any of the recognized exceptions; therefore, the actions of the officers in entering 16801 James Couzens were patently illegal. The actual seizure occurred after a search warrant based in part on the initial illegal entry. This delay cannot remove the taint from what were the fruits of that illegal action.

The arrest of Booth, Cody, and White gave the officers no derivative right to obtain the means of access to the building from Booth and force entry to the business premises. Probable cause to arrest an individual does not equal probable cause to search all his property. If that were the case, no distinction between arrest and search warrants would exist.

Chimel v. California, 395 U.S. 752 (1969) limits searches incident to a lawful arrest to areas within the immediate control of the arrested person—in this instance, the sidewalk in front of the building—certainly not the interior of the building, *Vale v. Louisiana*, 399 U.S. 30 (1970). The officers had secured the key, the means of access, from Booth and could have secured the building from the outside until a warrant was obtained.

Further, an examination of the testimony of the officers belies any belief on their part that exigent circumstances existed. After the three individuals were searched on the street, they were taken into the building where a more

thorough search of their persons was conducted (C.A. App. 182) including a field test of a substance removed from Cody's pocket (C.A. App. 183). Certainly, if the agents feared for their safety or believed evidence could be destroyed, they would have dispersed through the building immediately.

There was no showing that any other individuals were in the building. From prior surveillance, the officers had reason to believe that no others were on the premises. Officers may not force warrantless entry into a building simply because they believe that evidence of a crime may be discovered on the premises, *Johnson v. United States*, 333 U.S. 10 (1948); that determination is for the dispassionate review of a magistrate.

Further, the additional entry and search by Agent Graetz was clearly after any hypothetical emergency had terminated. The exigent circumstances doctrine will not permit such entry, even though the subsequent entry is limited to the scope of the initial intrusion and occurs immediately or shortly after the initial entry. *Mincey v. Arizona*, ____ U.S. ____ (1978), 98 S.Ct. at 2417; *United States v. Young*, 553 F.2d 1132, 1134 (8th Cir. 1977), cert. denied, 451 U.S. 957 (1977).

The "plain view" doctrine does not apply when officers have no right to be on the premises. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Facts and information gained both as a result of the preceding investigation and the illegal entry were co-mingled in the affidavit. The manner of access to the property was not presented to the magistrate (App. B, *infra*). The information tainted by the illegal entry was not trivial. *United States v. Carter*, 522 F.2d 666 (D.C. Cir. 1975). It was of such major significance that it must create grave doubt that the warrant would issue without it.

Officers may not enter simply because they believe they have probable cause to search and would be successful in getting a warrant at a later time. An "inevitable discovery" mentality, *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974), cert. denied, 419 U.S. 1050, would allow officers to act in almost every case before presenting facts to a magistrate.

An illegal search cannot be justified by the fact that it uncovers evidence of a crime. *United States v. Di Re*, 332 U.S. 581 (1948). Allowing officers to arrest individuals—gain from them the means of access to property—search that property, and use statements regarding objects observed to obtain a search warrant would reduce the Fourth Amendment warrant requirement to a nullity.

There is no logical limit to such action by officers. While this arrest occurred on the sidewalk in front of the building, the same action could take place if individuals were across the street, around the block, or in another part of town.

RELIEF REQUESTED

For the foregoing reasons, Petitioner prays that his Petition for Certiorari be granted.

Respectfully submitted.

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DATED: AUGUST 16, 1979

APPENDIX A

No. 79-5035

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.)
HAROLD BOOTH,)
Defendant-Appellant.)

Decided and Filed June 20, 1979

Before: WEICK, CELEBREZZE Circuit Judges, and PECK, Senior Circuit Judge.

This case is before the court on direct appeal from a judgment of conviction entered by the United States District Court for the Eastern District of Michigan against the appellant, Harold Booth, upon a jury verdict finding him guilty of conspiracy to manufacture cocaine, and conspiracy to manufacture phencyclidine (PCP) in violation of 21 U.S.C. §§841(A)(1) and 846. The appellant was sentenced to concurrent three year prison terms, a fine of $1,000, and a special parole term of three years.

The evidence at trial displayed that the appellant, a chemist and owner of a chemical laboratory, was involved with J. L. Cody. Cody had been purchasing chemicals from an undercover DEA agent and Cody told the agent he

needed the chemicals to manufacture PCP and cocaine. Cody also told the undercover agent that his confederate was a chemist who owned a "legitimate laboratory." The evidence, if not overwhelming, substantially displayed the appellant's involvement in the conspiracies.

On appeal. the appellant contends, *inter alia,* that the trial court inappropriately denied his motion to suppress evidence seized from his laboratory during the execution of a search warrant, and that he was denied his sixth amendment right to effective assistance of counsel. We reject each of the above contentions and find no basis for reversal.

The appellant was arrested outside his laboratory on April 15, 1977. He was accompanied by Cody and another man who were also arrested. Upon arrest the arrestees were taken inside the laboratory. The agents, not presently in possession of a search warrant, then proceeded to walk through the laboratory. Later that day tne agents secured a search warrant and upon execution of the warrant seized numerous chemicals and laboratory equipment. Appellant contends that the initial inspection of the premises, by the DEA agents without a warrant was *per se* unreasonable and violative of his fourth amendment rights. Appellant further argues that this alleged illegal search tainted the subsequent search warrant and all evidence seized must be suppressed.

The trial court denied appellant's motion on two grounds. The court ruled that defendant waived any objection to the legality of the search because of his untimely filing of his motion to suppress. See FED. R. CRIM P. 12(c), (f). The trial court also ruled that the subsequent warrant was not tainted by the alleged illegal search and therefore suppression would not be required even if the initial search was illegal. We agree with the district court that suppression is not required in the instant case.

The appellant also contends he was denied his sixth

amendment right to effective assistance of counsel. We have considered appellant's contentions and we do not agree that trial counsel's representation fell below the standard of "reasonably likely to render and rendering reasonably effective assistance" as enunciated in *Beasley v. United States,* 491 F.2d. 687, 696 (6th Cir. 1974).

Upon consideration of the record on appeal, the briefs and oral argument of counsel for the parties, and the court being fully advised in the premises finding no basis for reversal, Accordingly,

It is ORDERED that the judgment of conviction be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By: _____
Grace Keller, Chief Deputy

APPENDIX B

SEARCH WARRANT AFFIDAVIT

Special Agent John H. Graetz, being duly sworn, deposes and says:

1. That he is an agent with the Drug Enforcement Administration and has been so employed by DEA and its predecessor agencies for approximately 5 years.

2. That on April 14, 1977 the affiant purchased a sample of a substance from Jay Cody which was represented to be phencyclidine and recently manufactured. The amount purchased was given as a sample for a larger anticipated purchase. A field test was performed on the substance with positive results obtained for the presence of phencyclidine.

3. That on April 15, 1977 the affiant spoke with Jay Cody who advised him that at approximately 10:00 A.M. he (Jay Cody) would be going to the laboratory to re-crystallize the substance represented to be phencyclidine and thusly make it more potent.

4. That agents of the DEA observed Jay Cody leave his residence at approximately 9:45 A.M. and travel to 16801 James Couzens, Detroit, Michigan where he met a black male, later identified as Berkley White. The agents observed Jay Cody and Berkley White seated in a 1972 Javelin where they remained seated until another black male, later identified as Harold Booth, arrived at 16801 James Couzens, Detroit, Michigan. Upon the arrival of Harold Booth all three individuals entered 16801 James Couzens, Detroit, Michigan. 16801 James Couzens, Detroit, Michigan bears a sign reading "Crescent Medical Laboratories".

5. The affiant learned from prior undercover discussions with Jay Cody that a legitimate laboratory located near

James Couzens and supposed to have moved was involved in the illicit manufacture of phencyclidine.

6. That the three individuals, Jay Cody, Harold Booth and Berkley White, were later observed to exit 16801 James Couzens at which time they were placed under arrest. At this time the agents conducted a limited inspection of 16801 James Couzens to determine if there were other individuals present on the premises of 16801 James Couzens who could destroy possible evidence.

7. During the course of this limited inspection the affiant and other agents of DEA observed chemicals and glassware utilized in the manufacture of phencyclidine and certain pieces of equipment also utilized in the manufacture of other controlled substances.

8. The affiant and other agents of DEA also observed a quantity of suspected phencyclidine. At this point the premises were secured and the affiant returned to the Federal Building for a search warrant.

9. A search of Jay Cody after his arrest disclosed the presence of approximately 33.1 grams of a white crystallized powder. A field test disclosed positive results for the presence of phencyclidine.

_____

JOHN H. GRAETZ
Special Agent
Drug Enforcement Administration

Subscribed to and sworn to before me this 15th day of April, 1977.

_____

CHRIS E. STITH
United States Magistrate

APPENDIX C

In the Supreme Court of the United States

No. A-74

HAROLD BOOTH,

PETITIONER,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 19, 1979.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 23rd
day of July, 1979